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**IN THE  
COURT OF APPEALS OF INDIANA**

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SHAN VANDERVLiet,  
  
Appellant-Defendant,

vs.

TIM SHUTT, ET AL.,  
  
Appellee-Plaintiff.

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No. 30A01-0711-CV-533

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APPEAL FROM THE HANCOCK CIRCUIT COURT  
The Honorable Richard D. Culver, Judge  
Cause No. 30C01-0506-CT-467

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**APRIL 2, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

Shan Vandervliet appeals the trial court's grant of summary judgment in favor of Tim Shutt and the Brookville Road Community Church, Inc., in Vandervliet's negligence action. We affirm.

The sole issue for our review is whether the trial court erred in granting judgment in favor of Shutt and Brookville.

In 2002, Brookville began construction on an addition to the church. In November 2004, Vandervliet and Shutt began working on the addition. The church paid Vandervliet, a painter, \$20.00 per hour, and Shutt, a carpenter, \$15.00 per hour. The church did not have a written contract with either worker and did not withhold taxes from their paychecks. When the general contractor left the project in December 2004, the church pastor asked Shutt to assume some of the general contractor's duties, such as ordering materials.

In January 2005, Vandervliet was climbing scaffolding in the church so that he could paint the vestibule when he fell and was seriously injured. Brookville's workers' compensation insurance paid Vandervliet more than \$60,000.00 in temporary disability payments and an additional \$20,000.00 for a total disability. The Worker's Compensation Board approved the payments.

Vandervliet subsequently filed negligence actions against Brookville and Shutt alleging that the defendants had failed to provide Vandervliet with a safe working environment. Brookville and Shutt filed motions to dismiss wherein they alleged that Vandervliet's claims were barred by the exclusivity provision of the Indiana Worker's Compensation Act. Specifically, Brookville argued that because Vandervliet received

workers' compensation benefits, his negligence action for the same injury was barred. Shutt argued that because he and Vandervliet were in the same employ, the Act precluded Vandervliet from bringing a tort action against him.

Ruling on a paper record without a hearing, the trial court converted the motions to dismiss into summary judgment motions because of the introduction of evidence. The court granted the motions, and Vandervliet appeals.

Vandervliet's sole argument is that the trial court erred in granting summary judgment in favor of Brookville and Shutt. At the outset we note that the trial court converted both Brookville's and Shutt's motions to dismiss for lack of subject matter jurisdiction into summary judgment motions because of the introduction of evidence. This was unnecessary. When ruling on such motions to dismiss, the trial court may consider not only the complaint but also any affidavits or other evidence submitted in support of the motions. *GKN Co v. Magness*, 744 N.E.2d 397, 400 (Ind. 2001). The court may also weigh the evidence to resolve the jurisdictional issue. *Wishard Memorial Hospital v. Kerr*, 846 N.E.2d 1083, 1087 (Ind. Ct. App. 2006). In the interests of judicial economy, we will review this case as if the trial court had granted the motions to dismiss and review them under the appropriate standard of review. *See Burke v. Wilfong*, 638 N.E.2d 865, 867 n. 1 (Ind. Ct. App. 1994) (treating motions for summary judgment as motions for lack of subject matter jurisdiction).

The standard of review for a motion to dismiss for lack of subject matter jurisdiction is dependent upon what occurred in the trial court. *Jennings v. St. Vincent Hospital and Health Care Center*, 832 N.E.2d 1044, 1050 (Ind. Ct. App. 2005), *trans.*

*denied.* Where, as here, the trial court rules on a paper record without conducting an evidentiary hearing, the standard of review is *de novo*. *Id.* No deference is afforded the trial court's factual findings or judgment because a court of review is in as good a position as the trial court to determine whether the court has subject matter jurisdiction. *Id.*

In general, the Indiana Worker's Compensation Act is the exclusive remedy of an employee injured in an accident arising out of and in the course of employment with his employer. Ind. Code § 22-3-2-6. The Act, however, creates the following exception for some third parties:

Whenever an injury . . . for which compensation is payable under chapters 2 through 6 of this article shall have been sustained under circumstances creating in some other person than the employer and not in the same employ a legal liability to pay damages in respect thereto . . . the injured employee . . . may commence legal proceedings against the other person to recover damages notwithstanding the employer's or the employer's compensation insurance carrier's payment of or liability to pay compensation under chapters 2 through 6 of this article.

Ind. Code § 22-3-2-13.

Accordingly, an employee whose injuries arose out of and in the course of his employment may sue a third party who caused the injuries as long as the third party is not in the same employ as the employee. *Hatke v. Fiddler*, 868 N.E.2d 60, 64 (Ind. Ct. App. 2007). The test to determine whether the parties were in the same employ is whether the defendant could obtain benefits under the same or similar circumstances. *Tapia v. Heavner*, 648 N.E.2d 1202, 1208 (Ind. Ct. App. 1995).

Brookville contends that the trial court's ruling is correct because Vandervliet's negligence action is barred by the doctrine of election of remedies. In support of its contention, Brookville directs us to *Williams v. Delta Steel Corp.*, 695 N.E.2d 633 (Ind. Ct. App. 1998), *trans. denied*, wherein we explained as follows:

[B]y electing to come under the [Worker's] Compensation Act, an employer and employee accept the procedure provided by that act for the adjudication of claims for compensation, and they waive the right of a trial by jury. An agreement, when filed with and approved by the [Worker's Compensation] Board has the force and effect of an award, and adjudicates the facts involved therein. . . .

*Id.* at 635 (quoting *Indiana University Hospitals v. Carter*, 456 N.E.2d 1051, 1054 (Ind. Ct. App. 1983)). We therefore held that once the Act has become applicable either by compulsion or agreement, it affords the exclusive remedy for an injured employee against the employer, and the employee is barred from attempting to recover for the same injury from the employer under both the Act and at law. *Id.* at 637.

Here, Vandervliet and Brookville agreed that the Act was applicable, and Vandervliet received over \$80,000.00 in workers' compensation benefits from Brookville's insurer. Accordingly, Vandervliet is now barred from attempting to recover from Brookville for the same injury in a negligence action. The trial court did not err in granting Brookville's motion to dismiss for lack of subject matter jurisdiction.

Shutt also claims that the trial court's ruling is correct. Specifically, he contends that Vandervliet's action is barred because he and Vandervliet were in the same employ. In *Tapia v. Heavner*, 648 N.E.2d at 1208, we found that employees Tapia and Heavner, who worked in the same office and were identically situated, were in the same employ.

We therefore concluded that workers' compensation was Tapia's exclusive remedy and that the trial court lacked subject matter jurisdiction to entertain Tapia's complaint against Heavner. *Id.* Here, our review of the evidence reveals that Vandervliet and Shutt, who were hired at the same time, worked similar jobs under similar conditions at the same place, and were similarly paid, were also in the same employ. As in *Tapia*, we conclude that workers' compensation is Vandervliet's exclusive remedy, and that the trial court did not err in granting Shutt's motion to dismiss. *See also Northcutt v. Smith*, 642 N.E.2d 254 (Ind. Ct. App. 1994) (holding that employees who had similar responsibilities were in the same employ).

Affirmed.

MAY, J., and BRADFORD, J., concur.